

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
SKYBRIDGE SPECTRUM FOUNDATION)	FOIA Control No. 2010-418
)	
On Request for Inspection of Records)	

MEMORANDUM OPINION AND ORDER

Adopted: May 3, 2011

Released: May 3, 2011

By the Commission:

I. INTRODUCTION

1. By this memorandum opinion and order, we deny an application for review filed by Skybridge Spectrum Foundation (Skybridge).¹ Skybridge seeks review of a decision by the Office of General Counsel (OGC)² that denied Skybridge's request for a waiver of fees for processing the above-referenced Freedom of Information Act (FOIA) request.³ We deny Skybridge's application for review because it provides no basis to overturn the decision below.

II. BACKGROUND

2. In its FOIA request, Skybridge sought records pertaining to an earlier FOIA request filed by an attorney named Dennis Brown.⁴ As it had with respect to several of its FOIA requests,⁵ Skybridge sought a waiver of processing fees.⁶ OGC denied Skybridge's fee waiver request on the grounds that it failed to meet the standard for a fee waiver set forth in the FOIA and the Commission rules, namely that "disclosure of the information [requested] is in the public interest because it is likely to contribute to the public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."⁷ OGC found that Skybridge had failed to demonstrate that (1) the

¹ See Letter from Skybridge Spectrum Foundation to FCC Office of General Counsel (Jul. 16, 2010) (AFR).

² See letter from Joel Kaufman, Associate General Counsel to Skybridge Spectrum Foundation (Jun. 16, 2010) (Decision).

³ See e-mail from Skybridge Spectrum Foundation to FOIA@fcc.gov (May 10, 2010) (Request).

⁴ See e-mail from Dennis C. Brown to FOIA@fcc.gov (Jan. 20, 2010). Brown's FOIA request sought a document that Skybridge filed in a pending proceeding before the Commission that also involved Brown's client.

⁵ OGC denied similar requests by Skybridge for fee waivers in connection with 12 other FOIA requests: FOIA Nos. 2007-382, 2007-403, 2009-089, 2009-136, 2009-645, 2010-379, 2010-495, 2010-496, 2010-506, 2010-507, 2010-508, and 2010-538. The Commission affirmed OGC's denial with respect to Nos. 2007-382, 2007-403, 2009-089, and 2009-136. See *Warren Havens*, 24 FCC Rcd 12308 (2009); *Skybridge Spectrum Foundation*, FCC 10-135 (Aug. 3, 2010), reported at 15 Comm. Reg. (P&F) 12 (2010). The denials of Nos. 2010-379, 2010-495, 2010-496, 2010-506, 2010-507, 2010-508, and 2010-538 are the subject of a pending application for review. The fee waiver determination with respect to No. 2010-136 was not appealed.

⁶ See Request at 1-2.

⁷ See 5 U.S.C. § 552(a)(4)(A)(iii).

information requested would contribute to the public understanding of the operations or activities of the government, including that the information actually would be disseminated to the public, or (2) that the request did not primarily serve a commercial purpose.⁸

III. APPLICATION FOR REVIEW

3. Skybridge's application for review does not challenge OGC's finding that Skybridge is not entitled to a fee waiver. Instead, Skybridge raises two collateral arguments. The relevant portion of Skybridge's application for review states in full:⁹

(1) The FCC was late (beyond the statutory period of working days to respon[d]) in responding in any way to this Request and thus, it cannot assess any fees. Since it cannot assess any fees, the [Decision's] subject – fee waiver – is moot.

(2) The Request, contrary to the [Decision], stated that a certain sum would be paid toward fees assessed.¹⁰ It further stated that if that sum was not sufficient, the FCC should contact the requester. The[] FCC did not do that. Asking for a fee waiver or reduction does not invalidate the just noted statement.

IV. DISCUSSION

4. We deny Skybridge's application for review. Skybridge's first point asserts that the Commission missed a statutory deadline in responding to Skybridge's FOIA request and that this bars the Commission from charging the normal processing fees. Skybridge appears to rely on the language of 5 U.S.C. § 552(a)(4)(A)(viii), which provides (subject to exceptions not relevant here): "An agency shall not assess search fees . . . under this subparagraph if the agency fails to comply, with any time limit under paragraph (6)."¹¹ Paragraph 6¹² states in part that:

Each agency . . . shall . . . determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after receipt of any such [FOIA] request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor.¹³

5. In the present case, the Commission has not yet ruled on the merits of Skybridge's FOIA request, which was received May 10, 2010, and is therefore outside the 20-day time limit. Paragraph 6, however, identifies circumstances under which the 20-day time limit is tolled. In particular, "[t]he 20-day period may be tolled by the agency 'if necessary to clarify with the requester issues regarding fee assessment'"¹⁴ The Commission's rules in turn provide that ". . . [t]he time for processing a request for

⁸ See Decision at 2-3.

⁹ See AFR at 1.

¹⁰ The request specified a maximum search fee of \$100. See Request at 1.

¹¹ See also 47 C.F.R. § 0.470(a)(1)(ii) ("Commercial use requesters shall not be assessed search fees if the Commission fails to comply with the time limits under § 0.461(g)(1). . . .").

¹² See 5 U.S.C. § 552(a)(6)(A)(i).

¹³ The corresponding provision of the rules states: "The custodian of the records will make every effort to act on the request within 20 business days after it is received and date-stamped by the FOIA Control Office." 47 C.F.R. § 0.461(g)(1).

¹⁴ See 5 U.S.C. § 552(a)(6)(A)(ii)(II).

section of records will be tolled . . . [u]ntil clarification of issues regarding fee assessment occurs.”¹⁵ In this case, the 20-day time period has been tolled under the rules to clarify issues regarding fee assessment, inasmuch as Skybridge requested a fee waiver and, as discussed below, Skybridge has not committed to pay all estimated fees for processing its request. Because the time has been tolled, the Commission has not missed the 20-day time limit for responding to Skybridge’s FOIA request and is not barred from charging fees.

6. Turning to Skybridge’s second point, Skybridge offered in its FOIA request to pay a maximum of \$100 and asked to be contacted if that amount was insufficient.¹⁶ Skybridge did not indicate that it was willing to pay some or all of the fees pending the outcome of its fee waiver request. Following OGC’s denial of Skybridge’s request for a fee waiver and Skybridge’s filing of its AFR on that issue, OGC contacted Skybridge and explained that it is Commission practice, when a FOIA request contains a request for a fee waiver and makes qualified and unclear representations about the requester’s willingness to pay fees, to first rule on the fee waiver request and then ensure that the requester is committed to paying the applicable fees.¹⁷ Inasmuch as Skybridge’s fee waiver request had been denied, OGC informed Skybridge that the bureaus and offices responsible for processing Skybridge’s FOIA requests would either process the request (if the promised fee payment was sufficient) or would contact Skybridge to ensure that Skybridge is committed to paying the estimated processing fees.¹⁸ The Wireless Telecommunications Bureau (WTB) subsequently sent Skybridge a letter in response to the present request, which estimated that fees of \$1,064.33 would be charged for processing the request, which exceeded the \$100 that Skybridge had committed to paying.¹⁹ Skybridge responded to WTB but did not commit to paying the estimated fee.²⁰ Because OGC and WTB have acted consistent with Skybridge’s request that the Commission contact Skybridge if the cost of processing its FOIA request exceeded \$100, and Skybridge has not committed to paying fees for processing its FOIA request as our rules require,²¹ Skybridge’s application for review is denied as to this point.

¹⁵ See 47 C.F.R. §§ 0.461(e)(2)(B)(1)-(2).

¹⁶ See Request at 1. Skybridge stated “If getting the requested documents is going to exceed this maximum search fee, then Skybridge asks that it be informed of the amount by which it will be exceeded since Skybridge may want the FCC to proceed anyway for whatever additional cost there may be, or Skybridge may modify its request [so] as to obtain copies up to the amount specified here.”

¹⁷ See Letter from Ann Bushmiller, Deputy Associate General Counsel to Skybridge Spectrum Foundation (Aug. 26, 2010) at 2. Section 0.461(e)(2)(B)(1) of the Commission’s rules provides in this regard that the time for processing a FOIA request remains tolled during the pendency of a fee waiver request unless the requester has agreed to pay some or all of the fees pending the outcome of the waiver question. Skybridge has not committed to paying the fees.

¹⁸ See *id.*

¹⁹ See Letter from Roger S. Noel, Chief, Mobility Division to Warren Havens (Sept. 8, 2010).

²⁰ See e-mail from Warren Havens to Wilbert Nixon (Sept. 9, 2010). Instead of addressing WTB’s fee estimate, Havens wrote “I have a few questions regarding and some points of disagreement with your letter.”

²¹ See 47 C.F.R. § 0.461(e)(2)(B)(1).

V. ORDERING CLAUSE

7. ACCORDINGLY, IT IS ORDERED, that the application for review by Skybridge Spectrum Foundation IS DENIED. Skybridge may seek judicial review of this action, pursuant to 5 U.S.C. § 552(a)(4)(B).

8. The officials responsible for this action are the following: Chairman Genachowski
Commissioners Copps, McDowell, Clyburn and Baker.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary